

Time Warner Inc.
800 Connecticut Ave., N.W.
Washington, DC 20006

Comcast Corporation
2001 Pennsylvania Ave., N.W.
Washington, DC 20006

January 12, 2006

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: MB Docket 05-192

Dear Ms. Dortch:

Time Warner Inc. ("Time Warner") and Comcast Corporation ("Comcast") (collectively, the "Submitting Parties" or "Companies") hereby respond to the January 10, 2006 request for relief filed by DIRECTV, Inc. ("DIRECTV") in MB Docket 05-192.¹ DIRECTV seeks an electronic copy of all confidential and highly confidential spreadsheets submitted in response to the December 5, 2005 letter from Donna C. Gregg, Media Bureau Chief, transmitting a request for certain information and documents² related to the transactions involving Time Warner, Comcast, and Adelphia Communications Corporation (collectively, the "Applicants") that are the subject of the Consolidated Application for Authority to Transfer Control in MB Docket 05-192.

As explained in detail below, although not required to do so by the protective orders adopted in this proceeding, Time Warner and Comcast are offering to allow DIRECTV's outside consultants to view confidential and highly confidential documents in machine-readable format on computers with ample capacity connected to network servers, at the offices of the Companies' respective outside counsel, and to load their own software to analyze the data. Moreover, the Companies are confident that the law firm computers offered for use by DIRECTV have adequate processing power to run such software. Thus, DIRECTV's Request should be denied.

The materials at issue that have been marked "Copying Prohibited" contain some of the Submitting Parties' most sensitive business data that they maintain in the strictest of confidence. For example, these confidential and highly confidential materials include: 1) detailed financial data, such as per subscriber revenue figures for both Companies; 2) calculations of incremental, marginal and variable/fixed costs (with respect to Comcast) and Variable Margins and Operating Income Before Depreciation and Amortization (with respect to Time Warner); 3) video programming network data that would reveal to competitors the terms, conditions, and pricing

¹ See Letter from William M. Wiltshire, counsel for DIRECTV, Inc., to Donna C. Gregg, Chief, Media Bureau, MB Docket 05-192 (filed Jan. 10, 2006) ("DIRECTV Request").

² See Letter from Donna C. Gregg, Chief, Media Bureau, to Steven N. Teplitz and Susan A. Mort, Time Warner Inc., MB Docket 05-192 (Dec. 5, 2005).

structure under which the Submitting Parties buy and sell programming; and 4) data regarding the terms of the Companies' sports programming contracts, such as distribution rights, subscribership, revenues and other proprietary data that competitors could use to determine the Submitting Parties' negotiating strategies. Because disclosure of this data would cause both Comcast and Time Warner substantial competitive harm, such materials have appropriately been stamped "Copying Prohibited."

As the Submitting Parties previously indicated either in writing or in person to DIRECTV's counsel, because the spreadsheets DIRECTV seeks contain confidential and highly confidential information, the Submitting Parties have reasonably determined that they should not be available for copying by third parties. Accordingly, pursuant to the Protective Order and Second Protective Order (collectively, the "Protective Orders") issued in this proceeding, the highly competitive and proprietary data contained in these spreadsheets has been marked "Copying Prohibited."³ The Submitting Parties also indicated to DIRECTV's counsel that they are both willing to provide DIRECTV's outside consultants access to these spreadsheets in electronic format on a network computer at the offices of their respective outside counsel, so the consultants may analyze the data with their own software. But, given the sensitive nature of the requested data, the Submitting Parties could not honor any request by third parties to copy the data onto their own computers, particularly in a format subject to manipulation and unrestricted distribution.

DIRECTV's letter contains a number of erroneous allegations that the Commission should disregard outright. First, DIRECTV alleges that Comcast "insisted" that DIRECTV only view the data on a "laptop computer owned by Comcast's counsel." However, Comcast's response to DIRECTV's request never mentions restricting DIRECTV to the use of only a "laptop."⁴ Second, DIRECTV's allegation that Time Warner indicated that it would make its "Copying Prohibited" data available to DIRECTV's counsel and outside consultants in paper format only is completely unfounded. In fact, Time Warner made it clear, upon inquiries from DIRECTV's counsel in connection with their personal review of confidential documents at the offices of Fleischman and Walsh, L.L.P. on January 5, 2006, that such data could be viewed in electronic form, so long as it was viewed on a computer maintained at the offices of outside counsel, and that Time Warner would agree to the identical confidential document review procedures previously proposed by Comcast and confirmed in the letter from Comcast's counsel dated January 6, 2006.

Lest there be any remaining confusion on this issue, Time Warner and Comcast are offering to allow DIRECTV's outside consultants to review confidential machine-readable spreadsheets, and load their own software, on a robust computer attached to a network server – with ample capacity to facilitate any economic analysis – located at the offices of the Submitting

³ See Appendix A to Order Adopting Protective Order, MB Docket 05-192, DA 05-1673, ¶ 6 (rel. June 16, 2005) ("Protective Order"); Appendix A to Order, MB Docket 05-192, DA 05-3226, ¶ 7 (rel. Dec. 21, 2005) ("Second Protective Order").

⁴ See Letter from Martha E. Heller, counsel for Comcast Corporation, to Michael Nilsson, counsel for DIRECTV, Inc., attached to DIRECTV Request.

Parties' respective outside counsel, as well as to make any notes of these analyses to take with them.

As DIRECTV's request concedes, both the Protective Order and Second Protective Order provide that the determination of whether a document contains information that is so sensitive that it should not be duplicated is solely within the Submitting Parties' discretion.⁵ The Protective Orders also clearly state that the Submitting Parties' decision to only permit inspection of such confidential documents at the offices of outside counsel is a matter to be determined by the Submitting Parties.⁶ By providing several options for review of the information entitled to protection, the Commission has made it quite apparent that submitting parties are best suited to determine the appropriate arrangement by which to allow reviewing parties access to competitively sensitive and proprietary data. DIRECTV's assertion that the Commission has already addressed our confidentiality concerns by allowing us to designate documents as "highly confidential" is inherently flawed. By giving the Submitting Parties the right to designate documents as "Copying Prohibited," the Commission has already conceded that a "highly confidential" classification does not always provide sufficient protection.

The Commission recently confirmed that such decisions are best left to the discretion of submitting parties. In letters to the Commission in the Verizon/MCI and SBC/AT&T mergers, third parties expressed concern that, among other things, submitting parties indiscriminately applied the "Copying Prohibited" restriction to their document productions which prevented reviewing parties from obtaining an electronic version of those documents with which to conduct a meaningful data analysis.⁷ After considering the merits of the complaints, "including potential alternative mechanisms to balance the risks of granting access to certain highly sensitive competitive information in electronic form against the additional benefit of such access in providing material support on issues of real controversy," the Commission declined to interfere with the determinations by the submitting parties to designate confidential information as

⁵ See Letters attached to DIRECTV Request from Michael Nilsson to Martha Heller and Arthur Harding dated January 5, 2006 at 2. A submitting party may designate a document as "Copying Prohibited" should it determine "in its judgment" that "the document contains information so sensitive that it should not be copied by anyone..." Protective Order at ¶ 6; Second Protective Order at ¶ 7.

⁶ See Order Adopting Protective Order, MB Docket 05-192, DA 05-1673, ¶ 5 (rel. June 16, 2005); Order, MB Docket 05-192, DA 05-3226, ¶ 9 (rel. Dec. 21, 2005) ("Order Adopting Second Protective Order").

⁷ See Letter from Brad E. Mutschelknaus, *et al.*, Counsel for Cbeyond Communications, *et al.*, to Kevin J. Martin, Chairman, FCC, WC Docket Nos. 05-65, 05-75 (filed June 7, 2005); Letter from Gary R. Lytle, Senior Vice President – Federal Relations, Qwest, to Kevin J. Martin, Chairman, FCC, WC Docket Nos. 05-65, 05-75 (filed June 7, 2005) ("Qwest Letter"); Letter from Yaron Dori, Counsel for Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75 (filed Aug. 1, 2005).

“Copying Prohibited.”⁸ The facts are the same here and the Commission’s conclusion should be the same as well.

The Protective Orders also plainly specify that no copies of documents marked “Copying Prohibited” shall be made in any form.⁹ This restriction is even more crucial with respect to data reproduced in electronic form. The Second Protective Order states that “parties may inspect the documents on site with the ability to request one copy... other than those marked ‘Copying Prohibited,’ including data or documents... stored on floppy disk, CD-ROM, or similar electronic storage device...”¹⁰ This statement recognizes that any documents stored electronically would constitute a copy of the documents. Indeed, the Commission has expressly acknowledged that it views the electronic version of a document as a “copy” of such document, and has recognized the ease by which a single electronic copy can be reproduced and widely disseminated. For instance, while parties may be required pursuant to Commission rules to file multiple paper copies of submissions, parties filing “in electronic form need only submit one copy.”¹¹

DIRECTV is correct that the Commission requested and was provided certain data in machine-readable format so that it could analyze the data electronically, including the ability to apply statistical methodologies with special software. It is the province of the Commission, pursuant to the Communications Act, to conduct an appropriate analysis to confirm that the transactions subject to this proceeding are in the public interest and do not cause competitive harm.¹² It does not follow, however, that the Commission intended for third parties to have access to this information in machine-readable format in violation of both Protective Orders issued in this proceeding. Moreover, DIRECTV has offered no legal authority supporting its

⁸ See *Verizon Communications Inc. and MCI, Inc., Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, FCC 05-184, n. 54 (2005).

⁹ See Protective Order at ¶ 6; Second Protective Order at ¶ 7.

¹⁰ See Order Adopting Second Protective Order at ¶ 9.

¹¹ See 47 C.F.R. §§ 1.419(d), 1.429(h); see also *Electronic Filing of Documents in Rulemaking Proceedings*, Report and Order, 13 FCC Rcd 11322, ¶ 8 (1998). The fact that electronic documents can be reproduced and disseminated with very little effort is a matter of immense concern. Congress, in enacting the anti-trafficking provisions of the Digital Millennium Copyright Act (“DMCA”), was “[f]earful that the ease with which pirates could copy and distribute a copyrightable work in digital form” would overwhelm the Government’s conventional enforcement efforts. As such, Congress endorsed copyright owners’ use of digital walls and encryption codes to supplement the legal sanctions adopted in the DMCA. See *Universal City Studios, Inc., Paramount Pictures Corp., Metro-Goldwyn-Mayer Studios Inc., Tristar Pictures, Inc., Columbia Pictures Indus., Inc., Time Warner Entm’t Co., L.P., Disney Enters. Inc., and Twentieth Century Fox Film Corp. v. Eric Corley and 2600 Enters. Inc.*, 273 F.3d 429, 435 (2d Cir. 2001) (amended by *Universal City Studios, Inc. v. Reimerdes*, 2001 U.S. Dist. LEXIS 12548 (S.D.N.Y. Aug. 17, 2001)).

¹² See 47 U.S.C. § 310(d).

assertion that a third party whose interest in the proceeding is that of a direct competitor to the Applicants may use competitively sensitive data for independent analysis at all.¹³

There is simply too great a risk, given the sensitive and confidential nature of the data, in turning the data over to third parties in any format, and especially in an electronic format that permits manipulation, unrestricted distribution, and disclosure of highly sensitive data to direct competitors. Furthermore, DIRECTV could never guarantee that any electronic document supplied to them by the Submitting Parties would be completely destroyed or returned after use in compliance with the Protective Orders.¹⁴ An electronic document, copied to another party's computer is nearly impossible to fully delete, which, again, leaves the Submitting Parties vulnerable to dissemination of their confidential information.¹⁵

Ironically, DIRECTV's own statements belie its argument that the Submitting Parties should not be concerned about releasing confidential information in electronic form. DIRECTV's letter to the Commission reveals that it actually shares Comcast's and Time Warner's concerns. DIRECTV argues that it would be "problematic" for its outside consultants to place confidential work product on a computer it does not control.¹⁶ However, that is exactly what it is requesting from the Submitting Parties.

It is worth emphasizing that the Submitting Parties are not taking the view that DIRECTV's outside consultants may not have access to the data they seek. To the contrary, we are prepared to give them full access to the data and to allow them to run their own analyses of

¹³ Indeed, we find the suggestion that DIRECTV, perhaps the nation's most supremely geographically rationalized media company, seeks to challenge the fact that efficiencies and economies of scale will flow from clustering, to be particularly disingenuous. DIRECTV's transparent, self-serving efforts to delay its primary competitors from realizing the benefits of geographic rationalization that it has long enjoyed are utterly lacking in credibility.

¹⁴ "Within two weeks after conclusion of this proceeding and any administrative or judicial review," reviewing parties such as outside consultants "shall destroy or return to the Submitting Party Stamped Confidential Documents and all copies of the same. *No material whatsoever derived from Stamped Confidential Documents may be retained...*" See Protective Order at ¶ 14; Second Protective Order at ¶ 15 (emphasis added).

¹⁵ "Today's technology practically precludes the complete destruction of an electronic copy of a document. Even when a electronic document has been 'deleted,' all or a remnant of the document frequently remains on a computer." *People v. Jiang*, 31 Cal. Rptr. 3d 227 (Cal. App. 2005).

¹⁶ DIRECTV Request at 3. Similarly, in claiming that legal restrictions contained in its license agreements and terms of use hinder DIRECTV's ability to conduct its analysis at the offices of Submitting Parties' respective outside counsel, DIRECTV seems to completely ignore the more absolute legal restrictions applicable to the Submitting Parties' confidential and highly confidential data that effectively prohibit the data's reproduction. Moreover, we are confident that DIRECTV has sufficient financial resources to obtain off-site licenses for applicable computer software.

the data on a robust computer attached to a network server – with more than adequate capacity to facilitate any desired economic analysis – located at the offices of the Submitting Parties’ respective outside counsel. We have also agreed that DIRECTV’s consultants may make notes of these analyses to take with them.¹⁷

In following FCC-approved measures to safeguard sensitive business data, the Submitting Parties are not making the assumption that third parties will impermissibly disclose the data. Nevertheless, it is a fact that such impermissible disclosure of information subject to protective order in Commission proceedings is possible, and one would not be hard-pressed to understand why the Submitting Parties’, Time Warner especially, are particularly sensitive to this issue.¹⁸ With this in mind, the Submitting Parties have appropriately designated the requested materials “Copying Prohibited.” While the Submitting Parties appreciate that it may be inconvenient for DIRECTV’s outside consultants to travel to Washington, D.C. from Chicago to review and analyze the documents, the Submitting Parties’ interest in protecting their highly sensitive business data is paramount.

¹⁷ It should be noted that during the Verizon/MCI merger review, MCI chose not to provide an electronic copy of *any* of its documents to reviewing parties, even those documents not marked “Copying Prohibited.” See Qwest Letter at 5. DIRECTV surely must recognize that each time it runs an analysis of the confidential data, it is, in effect, making a copy of the data in some form. Printouts of such analysis are a copy of the data in yet another form. The Submitting Parties simply cannot allow DIRECTV’s consultants to leave the offices of their respective outside counsel with graphical representations (copies) of the data that it admits will be “preserved for comparison and other analysis.” See DIRECTV Letter at 2. Submitting Parties believe that their offer to allow DIRECTV’s consultants to make notes of their analysis to take with them is a reasonable accommodation under the circumstances.

¹⁸ See, e.g., *Applications of America Online, Inc. and Time Warner, Inc. for Transfers of Control*, Order, 15 FCC Rcd 19668 (2000) (rel. Oct. 10, 2000) (discussing the Walt Disney Company’s disclosure of confidential information in violation of the protective order issued in the AOL/Time Warner merger proceeding). DIRECTV’s cavalier remark that the violation was simply “one example of a disclosure of an email summarizing some confidential document,” minimizes the serious implications of the incident, and the potential impact of any impermissible disclosure for that matter. See DIRECTV Request at 3. The email in question, containing confidential information, was passed along a chain through multiple parties and was eventually forwarded to executives at the highest level of one of Time Warner’s principal competitors. DIRECTV clearly misses the point, that the chance of even one disclosure of confidential sensitive business data is sufficient reason to prevent such data from being distributed in electronic form.

For all of the foregoing reasons, DIRECTV's request to abrogate the protections of the Protective Order and Second Protective Order should be denied.

Respectfully submitted,

Comcast Corporation

By: /s/ James R. Coltharp
James R. Coltharp
Comcast Corporation

Time Warner Inc.

By: /s/ Steven N. Teplitz
Steven N. Teplitz
Time Warner Inc.

cc: Donna Gregg
Royce Sherlock
Sarah Whitesell
Julie Salovaara
William Johnson
Tracy Waldon
Marcia Glauberman
Wayne McKee
Jim Bird
Jeff Tobias
JoAnn Lucanik
Kimberly Jackson
Neil Dellar
Ann Bushmiller
Best Copy and Printing, Inc.
William M. Wiltshire, Esq.
Michael D. Nilsson, Esq.